OUTGOING AIRGRAM

DEPARTMENT OF STATE DIVISION OF COMMUNICATIONS AND RECORDS TELEGRAPH BRANCH

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AMEMBASSY,
TOKYO.

A-128 June 17, 1952

SUBJ CT: FCN Treaty. Informal discussions. Embassy's despatch 98, May 21, with enclosures.

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Comments on points 1, 2 and 4 listed in reference despatch have been previously forwarded. There follow such comments as appear called for concerning the discussions reported in the memoranda of conversation reported in reference despatch.

Enclosure 1 (Eighteenth Meeting) With reference to the second paragraph on page 5, it may be noted that the "American selling price" principle is applicable to only a relatively small number of products, although there may be items in this category of interest to Japan (e.g., cheap rubber-canvas shoes). The principal standard of valuation is the so-called "foreign value" or "export value", whichever is higher. If neither of these is ascertainable, then the standard is "United States value", if ascertainable; if not, the standard is "cost of production". The pending customs simplification bill as passed by the House eliminates "foreign value", and makes certain other changes, but, as noted, retains "American selling price" for those few special cases to which it is presently applicable.

Enclosure 2 (Nineteenth Meeting) With reference to the provisions of the Colombia Treaty relating to the right to organize companies, it should be noted that the most favored-nation rule of Article VII, paragraph 2(c), is in addition to Article VIII, paragraph 1. The latter, which vouchsafes an effective right approximating national treatment, is considerably stronger than the former and would be the provision normally invoked in connection with corporations engaged in the activities listed. The most-favored nation rule would be of importance primarily as to activities excepted from the national treatment rule of the treaty.

Enclosure 3 (Twentieth Meeting, Point 3 reference despatch) The Department confirms that the provision of Article VII(2) regarding "new limitations" is not considered to derogate from the right of [illegible] their country to expropriate property for public purposes, whether through a nationalization program or otherwise, provided that the requirements of Article VI are observed.

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The net impression left by the discussion of the "standards" of treatment to be applied, under Article XII to withdrawal of earnings in different currencies, with respect to a particular field of activity (page 5, enclosure 3), is not clear; and accordingly the following observations appear to be in order. If Japan's holding of sterling, for example, were plentiful but her holdings of dollars scant, it might be entirely reasonable and consistent with Article XII for sterling claimants, as a whole, to enjoy more ample withdrawal opportunities than dollar claimants, and consequently for the British investor in a given field of activity to enjoy more generous privileges with respect to sterling withdrawals than his American competitor enjoyed with respect to dollar withdrawals. Japan need not deny sterling withdrawal opportunities to anyone merely because her dollar situation might be so tight that she would not be able to permit liberal dollar withdrawal privileges. The only rule of non-discrimination as between currencies is that of paragraph 4 which merely precludes measures that are "arbitrarily" discriminatory, or "unnecessarily" detrimental. Paragraph 1 has to do with equality of access to any given currency, rather than with non-discrimination between different currencies as such. Article XII, of course, aims to assure the American investor, both absolutely and in relation to other foreign investors, the maximum privileges that circumstances will permit; but it recognizes that circumstances may be such as genuinely to require over-all differentiations between different currencies.

Enclosure 4 (Twenty-first Meeting) The Department may wish to comment later on the point raised in the further discussion of Article XII. It may be noted that the treaty does not in terms predicate the withdrawal rights of an American upon the currency in which he made his original investment; and that the treaty's language on this point was deliberately chosen.

Insertion of word "to" between "accorded" and "like" in sixth line of paragraph 4, Article XIX, is confirmed.

As to the use of the term "imports or exports" in Article XVII, paragraph 1, the Department inclines to the view, as suggested by the Japanese, that import or export products are envisaged. The provision speaks of purchases and sales "involving" imports and exports, and would touch upon invisibles only indirectly as they might be corollary to the trade in physical goods. While it may be that the net result in fact is approximately the same whichever interpretation is adopted, it is important to observe that the rule regarding "services" in paragraph 2 is, by design,

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stated in different terms from that relating to "imports" and "exports" in paragraph 1. The Department would be glad to receive more information from the Embassy, if it cares to comment further, as to the reasoning underlying its suggestion that the words "imports or exports" should be interpreted as import-export trade generally.

As to Article XIII, the final clause ("and regulations governing the exercise of their functions") is a subordinate clause following the word "including". That is, the phrase "customs and other matters" is intended to be a comprehensive generalization, and all the matter following the word "including" is intended to be illustrative.

As to Article XII, paragraph 3, the concluding phrase "giving consideration to special needs for other transactions" is a qualification that is not limited to clause (c). If it had been so intended, semi-colons rather than commas would have been used to separate clauses (a), (b) and (c). This paragraph, as it is now formulated in the standard draft, reflects an attempt to strike a fair balance between and among all the equities at stake, in an extremely complex matter. On the one hand, Department wished to place particular emphasis on the principle of assuring maximum feasible privileges to investor interests, after allowance is made for the monetary reserve considerations of paragraph 2 and the need for financing essential imports and services. This allowance having been made, however, it would yet be infeasible to give investor claims an absolute priority over all others. Some flexibility has to be retained to meet other perfectly proper and legitimate claims for a fair share of the limited exchange available during a stringency period; for example, exchange necessary to finance the so-called "token import" program or a cultural or student interchange program, or to allow the transfer of a small inheritance, or to meet the annual dues of some worthy international organization. In any event, it would be hazardous to attempt a rigid scheduling of priorities in a treaty which is designed to endure over a long and uncertain future. The solution finally adopted, therefore, was to introduce the recital of investor claims with the phrase "reasonable provision", and to conclude it with a de-emphasized reference to the proposition that the specific recital, though entitled to particular weight is not to the exclusion of all other legitimate claims upon available exchange.

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This concludes Department's comments on reference despatch and its enclosures. Embassy's reporting continues to be superb.

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